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Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD CO.,
Petitioner,

vs.

MICHAEL BUCKLEY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For the Second Circuit

AMICUS CURIAE BRIEF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND MEDICAL AND SCIENTIFIC PROFESSIONALS IN SUPPORT OF RESPONDENT

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BRIEF OF AMICI CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND MEDICAL AND SCIENTIFIC PROFESSIONALS IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose 50,000 members primarily represent injured plaintiffs, including workers who have suffered harm as a result of exposure to asbestos are frequently represented by ATLA members.

In ATLA's view, the position adopted by the Second Circuit with respect to recovery of damages for emotional distress and medical monitoring under FELA is amply supported by case law. ATLA will not burden this Court with repetition of the authorities persuasively set forth in the briefs of Respondent and other amici.

ATLA believes that it can better assist this Court by presenting the views of the nation's leading experts in the field of medical protection of workers exposed to toxic substances.

These professionals have written extensively about the medical examinations given to workers exposed to hazardous substances. They have served on governmental committees to recommend public policy on the subject of medical examinations of workers exposed to hazardous substances,and they have been active in the design and implementation of medical programs designed to protect workers exposed to toxic materials.

These medical professionals are not affiliated with the Association of Trial Lawyers of America. They have received no remuneration from ATLA or from Respondent in exchange for their participation as amici. They appear before this Court as amici to explain the medical and scientific grounding for medical monitoring programs, which may be "matters far afield from the expertise of judges," *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 599 (1993)(Rehnquist, C.J. dissenting)

Nicholas A. Ashford is Professor of Technology and Policy at the Massachusetts Institute of Technology, where he teaches courses in Occupational and Environmental Health Law and Policy. Dr. Ashford is also adjunct faculty at the Harvard and Boston University Schools of Public Health.

He is author of *Crisis in the Workplace: Occupational Disease and Injury*, (1976, MIT Press) and *Monitoring the Worker and the Community for Chemical Exposure and Disease: Legal and Ethical Considerations in the U.S.*, Clinical Chemistry, 40/7B Supplement, pp. 1426-1437, July 1994. He is also the co-author of *Monitoring the Workers for Exposure and Disease* (1990, Johns Hopkins University Press), *Monitoring the Worker for Exposure and Disease: Scientific, Legal and Ethical Considerations in the Use of Biomarkers*, (1990, John Hopkins University Press), *Chemical Exposures: Low Levels and High Stakes* (first edition 1991, second edition in press 1997, Van Nostrand Reinhold) and *Technology, Law and the Working Environment* (second edition 1996, Island Press).

Philip J. Landrigan is the Ethel H. Wise Professor, Chair of Community Medicine and Director of Environmental and Occupational Medicine at the Mount Sinai School of Medicine. From 1970 to 1985, Dr. Landrigan, as a commissioned officer in the United States Public Health Service, served as an Epidemic Intelligence Service officer and then as a medical epidemiologist with the Centers for Disease Control. From 1979 to 1985, as Director of the Division of Surveillance, Hazard Evaluations and Field Studies of the National Institute for Occupational Safety and Health, he directed the national program in occupational epidemiology.

Dr. Landrigan has a long-standing research interest in the clinical and epidemiologic evaluation of human diseases caused by toxic environmental and occupational exposures. His research has included studies of heavy metal poisoning, pesticide intoxication, solvent neuropathy, chronic lung disease, chemically induced renal disease and occupational carcinogenesis.

Dr. Landrigan has a strong interest in the interface of medicine and public policy. At the request of the New York State Legislature, he conducted a study of the prevalence and economic consequences of occupational disease in New York. The study concluded that occupational diseases are a serious and costly problem and led the Legislature to establish a unique statewide network of clinical centers in occupational medicine.

Dr. Landrigan is a member of the Institute of Medicine of the National Academy of Sciences. He is Editor-in-Chief of the *American Journal of Industrial Medicine* and of *Environmental Research*. He has chaired committees at the National Academy of Sciences on environmental neurotoxicology and on pesticides in the diets of infants and children. He is chair of the Asbestos Advisory Board of the State of New York.

James Melius, an occupational and environmental physician and epidemiologist, is currently Director of the New York State Laborers' Health and Safety Trust Fund. He previously worked for the National Institute for Occupational Safety and Health and the New York State Department of Health where he directed occupational and environmental health programs. As part of his work with these governmental agencies, he frequently recommended medical monitoring programs for populations exposed to toxic substances in the workplace or the general environment. He was an advisor/consultant to the court-ordered and administered medical monitoring program that was created for thousands of former workers of the Fernald, Ohio uranium plant as a result of the settlement of *Day v. NLO*, Case No. 90-CV-067 (S.D. Ohio, Western Div.).

Kenneth B. Miller is a Board Certified specialist in Preventive Medicine with a sub-specialty certification in Occupational and Environmental Medicine. He is the Medical

Director of the Seafarers Welfare Plan, a multi-employer trust fund which administers annual medical evaluations and medical surveillance programs to merchant mariners in accordance with United States Coast Guard regulations and the prevailing practice requirements in the maritime industry. Throughout his career, he has examined hundreds of individuals who have been occupationally exposed to toxic substances. In many of these individual cases, he has routinely recommended medical evaluations for the early detection and medical monitoring of the adverse health outcomes that are associated with occupational exposure to hazardous substances. He has also designed and implemented many medical monitoring and early detection programs in compliance with federal regulations that require medical surveillance for adverse health outcomes related to hazardous occupational exposures.

Laura Welch is Professor of Medicine and Chair Designate of the Department of Occupational and Environmental Health at George Washington University. Dr. Welch regularly designs and administers medical surveillance programs for workers who have been exposed to hazardous and carcinogenic substances. She served on numerous committees of the Occupational Health and Safety Administration and the National Institute for Occupational Safety and Health which made recommendations for medical surveillance programs for workers exposed to toxic substances.

Robert Wones is Professor of Internal Medicine at the University of Cincinnati School of Medicine. He is administering the court-ordered medical monitoring programs for both residents and former workers of the Fernald uranium plant. The program for residents, ordered as part of *In Re: Fernald*, No. C-1-85-149 (S.D. Ohio, W.Div.), has been operating for 6 years and the program for workers, ordered as part of *Day v. NLO*, No. 90-CV-067 (S.D. Ohio, W.D), has

been operating for 2 years. Over 10,000 people are participating in medical monitoring examinations as part of the programs.

SUMMARY OF ARGUMENT

Medical monitoring of workers exposed to hazardous and carcinogenic materials in order to meliorate the deleterious effects of the exposures is generally accepted by the medical, scientific, and public health communities and these medical monitoring programs are implemented by the government and employers

INTRODUCTION: PRINCIPLES OF PREVENTIVE MEDICINE

This brief expresses medical opinions that constitute the same advice that the parties would offer to any person who sought their professional opinion based on mainstream medical expertise about the prudent steps to be taken when a person has been exposed to carcinogenic substances.

The opinions presented begin with the premise "an ounce of prevention is worth a pound of cure". This well-known aphorism is the cardinal principle upon which preventive medicine is based. Similarly, it is the guiding principle of occupational and environmental medicine, the sub-specialty of medicine that deals with people who have been exposed to hazardous substances.

The opinions and recommendations offered are medically sound and prudent. The recommendations are fiscally prudent as well. Medical examinations for the early detection of cancer are fiscally prudent and cost effective because early detection of disease can not only save lives and lessen

suffering, but they also can lessen the cost of treating cancer, which when found later can require more expensive treatment.

Medical monitoring of people exposed to asbestos is a generally accepted and practiced procedure of preventive medical practice. Protocols have been developed for people exposed to asbestos. These protocols, which are based on the toxicity and carcinogenicity of asbestos, are used by doctors who, as they do with all other standard medical protocols, use them as a basis of treating individual patients.

I. MEDICAL MONITORING PROGRAMS FOR WORKERS EXPOSED TO CARCINOGENS ARE IMPLEMENTED BECAUSE THE DELETERIOUS EFFECTS OF CANCER CAN BE AMELIORATED BY EARLY DETECTION ACCOMPLISHED BY EXAMINATIONS TARGETED TO THE TYPES OF CANCER KNOWN TO BE CAUSED BY THE HAZARDOUS EXPOSURES

The benefits of the early detection of cancer are an integral part of contemporary public health and medical practice. Examinations for the early detection of cancer are universally accepted. Perhaps the most widely recognized of these guidelines and recommendations is from the American Cancer Society which recommends a variety of exams for the early detection of cancer.

> [A]fter an extensive review of the available information, the Society finds that the early detection of cancer is a very important health promotion activity.

Ca-A Cancer Journal for Clinicians: ACS Report on the Cancer-Related Health Checkup, July/August 1980, Vol. 30, No. 4, page 195.

The strategy of doing diagnostic exams on people in order to find early signs of cancer is based on various benefits that early detection can provide. In the first instance, early detection can lead to improved prognosis and better survival rates. Early diagnosis may also permit a wider range of therapeutic options. Early detection also leads to better quality of life in the time that a person survives.

The American Cancer Society has long been in the forefront of recommending prophylactic examinations for the early detection of cancer. Its recommendations, as well as the recommendations of other groups such as the American College of Physicians and Surgeons, are for the population at large and not for sub-groups within the population that are at an increased risk of cancer. *Preventive Care Guidelines: 1991 Annals of Internal Medicine*, Volume 114, No. 9, May 1991, page 758; *Guide to Clinical Preventive Services: An Assessment of the Effectiveness of 169 Interventions: Report of the U.S. Preventive Services Task Force*,Williams & Wilkins, Baltimore, 1989. For example, the American Cancer Society does not recommend chest x-rays to detect lung cancer in the general population but does recognize that x-rays to detect lung cancer are appropriate for groups with a higher risk of lung cancer. Fink, Diane J., *Guidelines for the Cancer-Related Checkup*, American Cancer Society, Atlanta, 1991.

II. MEDICAL MONITORING OF WORKERS WHO HAVE BEEN EXPOSED TO HAZARDOUS AND CARCINOGENIC SUBSTANCES IN ORDER TO AMELIORATE THE EFFECTS OF EXPOSURES HAS LONG BEEN A CARDINAL PRINCIPLE OF THE MEDICAL AND SCIENTIFIC COMMUNITIES AND

IT HAS BEEN IMPLEMENTED BY EMPLOYERS AND REQUIRED BY NUMEROUS GOVERNMENT AGENCIES

Occupational and environmental medicine is the sub-specialty of preventive medicine that concerns itself with toxic exposures in the work place. It has been long recognized that even though efforts are made to control hazardous exposures, a necessary element of any protective system in which people are exposed to hazardous materials is medical monitoring to look for early signs of disease. Hankinson, John L., *Pulmonary Function Testing in the Screening of Workers: Guidelines for Instrumentation, Performance, and Interpretation*, Journal of Occupational Medicine, Vol. 28, No. 10, October 1986, page 1081. Goldsmith, J.R, et al., *Pulmonary Function Screening and Monitoring in Occupational Health*, Journal of Occupational Medicine, Vol. 28, No. 8, August 1986, page 656. Federal law requires on-going medical monitoring of workers exposed to twenty one hazardous substances, including asbestos. 27 U.S.C. §651, et seq.; C.F.R. 1910.1003 to 1910.16. For asbestos and other toxic substances, the Occupational Safety and Health Administration requires monitoring to detect early signs of disease in order to ameliorate the effects. Silverstein, Michael, *Analysis of Medical Screening and Surveillance in 21 Occupational Safety and Health Administration Standards: Support for a Generic Medical Surveillance Standard*, American Journal of Industrial Medicine, 26:283-295 (1994). Specifically in the case of asbestos, OSHA requires that an exposed worker receive x-rays and other tests to look for early signs of lung disease.

The U.S. Department of Energy, which owns the nuclear weapons production plants, has for decades required that the operators of these plants maintain on-going medical monitoring programs for their workers because of the possibility of exposure to carcinogenic materials. U.S. Atomic

Energy Commission, AEC Manual OR 4161-03, *AEC Employee Occupational Health Services Program*, 1972. U.S. Energy Research and Development Administration, *Contractor Occupational Medical Program*, Appendix 0528-A. U.S. Department of Energy, Environmental Protection, Safety and Health Protection Program for DOE Operations, DOE 5480.8, *Contractor Occupational Medical Program*, 5-22-81, 11-16-87, 6-26-92. Medical monitoring for former DOE weapons plant workers who have been exposed to carcinogens at hazardous levels is mandated by statute. 42 U.S.C. §9604. The Department of Energy funds medical monitoring programs for former workers who were exposed to carcinogenic materials, which includes examinations to accomplish the early diagnosis of cancer. The Agency for Toxic Substances and Disease Registry is authorized by statute to implement medical monitoring programs for people who have been exposed to hazardous substances. 42 U.S.C. §9604(i)(9).

Medical monitoring of workers and former workers for the early direction of cancer is not only deemed necessary by the public health community and government agencies, but the need for this kind of service is widely recognized by the employers. Many large employers maintain occupational medical programs to provide these protective services to workers. Hulka, Barbara S., *Screening for Cancer: Lessons Learned*, Journal of Occupational Medicine, Vol. 28, No. 8, August 1986, page 687.

The role of the employer in providing these services is crucial because these services are not typically covered by traditional providers of medical services. Most health insurance programs and health maintenance organizations do not provide the examinations medically needed because a worker is at increased risk of cancer when of a hazardous exposure.

Nor does workers compensation pay for these kind of prophylactic examinations. Ironically, workers compensation may have to pay for the treatment of a cancer that is deemed to be caused by the workplace, but it does not provide the exams that would prevent and ameliorate the effects of the cancer caused in the workplace. There is no question that a person who has an increased risk of cancer because of hazardous exposures should participate in a medical monitoring program to meliorate the effects of the cancer (this concept is akin to the legal doctrine of "mitigation of damages"), yet existing medical insurance programs very rarely pay for these services.

III. THE CRITERIA FOR MEDICALLY MONITORING PEOPLE WHO HAVE BEEN EXPOSED TO TOXIC AGENTS ARE WELL ESTABLISHED AND RECOGNIZED IN THE SCIENTIFIC AND MEDICAL COMMUNITY

The criteria for medically monitoring people exposed to hazardous agents are widely recognized and accepted. Generally speaking, these criteria include knowledge of the toxic effects of the exposure, the availability of diagnostic exams that identify signs of illness at early stages, and the existence of effective treatment that can be administered when early signs of disease are discovered.

An excellent summary of the generally accepted principles for medical monitoring of people exposed to hazardous substances is found in the Agency for Toxic Substances and Disease Registry's Final Criteria for Determining the Appropriateness of a Medical Monitoring Program Under CERCLA.[1] Federal Register, Volume 60, No. 145, July 28, 1995.

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[1]The ATSDR is authorized under CERCLA to conduct medical monitoring of residents near hazardous waste sites.

Monitoring is periodic medical testing to screen the individuals who are at increased risk of disease but who have not shown symptoms of the disease.

The criteria include:

1. Exposure to contaminants at levels known to cause adverse health outcomes.
2. Documented health research that exposure to the substance causes known health effects.
3. The ability of an examination to predict the presence or absence of a disease.
4. The availability of effective treatments when there is early detection of disease.

IV. THE OCCUPATIONAL MEDICAL COMMUNITY HAS FOR MANY YEARS RECOMMENDED AND CARRIED OUT MEDICAL MONITORING PROGRAMS FOR WORKERS WHO ARE OR HAVE BEEN EXPOSED TO ASBESTOS BECAUSE THE SPECIFIC CANCER RISKS TO THAT POPULATION CAN BE IDENTIFIED AND EXAMINATIONS ARE AVAILABLE TO AMELIORATE THE EFFECTS OF THOSE DISEASES BY EARLY DETECTION

Asbestos is known to cause a number of cancers including lung cancer, mesothelioma and cancer of the bowel, as well as other non-malignant conditions. These diseases do not typically occur until years after exposure. The occupational medical community has for many years conducted medical monitoring programs of workers who have been exposed to asbestos in order to meliorate the effects of these cancers by early detection. Protocols for these programs have been carefully developed over a number of years and have been carried out on tens of thousands of

workers. Cancers have been detected and lives have been saved, prolonged and improved.

Medical monitoring programs for workers exposed to asbestos not only have demonstrated benefits directly attributed to the early detections accomplished by the exams, but there are other important health benefits for workers. For example, it is known that the carcinogenic effects of asbestos and cigarette smoking together have a synergistic relationship. This means that the risk of smoking and the risk from the asbestos, when combined, creates a risk that is much larger than each of the two risks added together. This synergistic risk, which can be increased as much as 50 fold [Selikoff, Hammond, Churg, *Asbestos Exposure, Smoking and Neoplasm*, JAMA 1968, 204:104-110], is emphasized as part of a medical monitoring program. Workers are taught that the combined risk of smoking and asbestos is enormous and the workers are encouraged to participate in smoking cessation programs. As part of the medical monitoring program for asbestos workers, they are taught how to look for early signs of disease and how to avoid other exposures to protect themselves against worsening the increased cancer risk they already suffer. Medical monitoring programs also include promoting dietary changes which the person with increased risk can make in order to further protect against the increased risk of cancer.

CONCLUSION

For the foregoing reasons, Amici ask this Court to affirm the judgment of the Second Circuit.

Respectfully submitted,

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